

Congressional FHWA Earmarks & Discretionary Programs Q & A

Q. How are earmarks and discretionary program funds different?

A. A Congressional earmark is a specific statutory designation. That is, Congress designates or “*earmarks*” funds for a specific project in either a multi-year reauthorization act or an annual appropriations act. The legislation provides a description and a dollar amount.

FHWA Discretionary programs, administered by various FHWA offices, represent special funding categories where the agency solicits for candidates and selects projects for funding based on applications received. Each program has its own eligibility and selection criteria that are established by law, by regulation or administratively. Typically, the solicitations, by program, take place annually. There are no established dates for program solicitations or announcements of awards.

Discretionary funds are open to the Congressional earmarking process; therefore, solicitations are issued only if the funds are available. This means discretionary program funds may either be provided through a solicitation procedure or by earmark in an appropriations act. Should program funds be earmarked, FHWA typically requires the receiving entity to complete an application. The Discretionary program process is coordinated through the state DOTs. States are responsible for ensuring applications are completed in accordance with submission requirements, for establishing priorities, and for submission to FHWA.

Q. Are earmarks and discretionary program funds grants?

A. No. The source for both earmarks and discretionary program funds is the Federal-aid Highway Program which is a reimbursement program. Funds are not “cash up-front”. FHWA makes payments to states for costs as they are incurred, and only for the Federal share. In addition, all FHWA rules and requirements apply to the use of such funds which must flow through ODOT. A local governmental entity can not enter in a direct agreement with FHWA.

Q. How much is the “Federal share” and is there a “Local match”?

A. This can vary. *Federal share* or the *Federal pro rata* is the percentage amount that the Federal government will participate in. Typically, the Federal share is 80%, so the local match is typically 20%. However, because there is variability between Federal programs, the Federal and local percentages should be confirmed. ODOT will notify the project sponsor of the pro ratas.

Q. My Congressional member called me and told me I have \$2 million. Can I start my project?

A. No. First, you need to verify that you have the funds. ODOT will provide you with that verification. The funds may be contained in a bill but the bill may not be passed by Congress and signed into law by the President. The respective ODOT district will meet with you and proceed with programming, scoping the project and contract requirements. No work can begin without

Federal authorization, which is obtained from FHWA by ODOT. “Work” means signing a contract, advertising for bids, or doing physical work. To do any such activity before Federal authorization is received will result in the work being ineligible for federal funds.

Q. The original \$2 million award was reduced. Why did ODOT cut the funding?

A. ODOT did not cut your funding. Federal funds are continually subjected to various adjustments which can either increase or decrease the original amount. Congress makes such adjustments to be responsive to the budget and economic policy. The primary adjustment applied to all allocations is *Obligation Limitation*. This is a statutory budgetary control that serves as a ceiling on funds to control the rate at which Federal-aid funds may be used. The limitation is applied as a percentage.

The application of the obligation limit can be complicated if an earmark is received in a multi-year reauthorization act (such as SAFETEA-LU) since the “ob” limit is determined with the passing of each annual appropriations act. In a multi-year reauthorization act, the earmarks are spread out over the life of the act, i.e., a portion of the earmark is provided in each year. Each annual portion is subjected to that year’s annual obligation limit so, as an example, the effect could look something like in the table below for a \$2 million earmark that is provided in five equal increments.

Year	Year 1	Year 2	Year 3	Year 4	Year 5	Totals
Allocation	\$400,000	\$400,000	\$400,000	\$400,000	\$400,000	\$2,000,000
Obligation Rate	91%	89%	91%	91%	85%	
Adjusted Allocation / Obligation Limit	\$364,000	\$356,000	\$364,000	\$364,000	\$340,000	\$1,788,000

The end result is that a \$2,000,000 earmark, as listed in the authorization act, is reduced to \$1,788,000.

Another such adjustment is *Revenue Aligned Budget Authority (RABA)*. This annual adjustment is made to Federal authorizations and obligation limitation, and can be upward or downward. RABA reflects revised receipt estimates for the Highway Account of the Highway Trust Fund. This adjustment effects all apportionments in the annual authorization bill.

Congress may also apply *rescissions*. These are Congressional acts that cancel budget authority or “cut” the amount originally made available. These can be applied in appropriations acts and, typically, are across-the-board.

Other types of adjustments may also be applied. The important thing to know is that obligation limitations and other adjustments are inevitable and have an effect on the final amount of the earmark or discretionary award that will actually be available. As a result, a local government could be provided less or more funds than originally anticipated. At the end of the project there will be an adjustment based on the final available amount of Federal dollars.

Q. How can I keep track of adjustments?

A. Beginning with the 2008 Appropriations Act, ODOT will be providing formal notice to local governments every time there is a Congressional adjustment. The adjusted amount will not be provided, only notice that an adjustment has occurred and the type. In order to ensure that notices are received, local government recipients of earmarks and discretionary awards should supply an e-mail address to Linda.Bailiff@dot.state.oh.us

Q. Who can serve as a project sponsor?

A. According to the Ohio Revised Code, only a local government entity can serve as a project sponsor. Nonprofit organizations or private entities must partner with the appropriate local government to serve as sponsor.

Q. What can the earmark or Discretionary award be used for?

A. Funds can only be used according to the description of the earmark or discretionary award. If there is a question, ODOT will ask FHWA for a determination. Generally, funds can be used for any phase of a project unless the description is specific. Many descriptions use the words “construct” or “improvements” which are typically interpreted as any phase. Specific language which limits the use includes “acquire” or “purchase”, “design”, and any references to studies.

Q. ODOT said we can't use the funds for what we want to. Now what?

A. The project sponsor will need to ask its Congressional member to obtain a change or modification. Depending on the source of the earmark, and any statutory language contained in the originating legislation, a project description usually needs to be modified by additional legislation. Please let ODOT know if you wish to pursue a language change as we can provide assistance.

Q. Can we use the funds to reimburse for administrative costs?

A. No. Administrative costs are not eligible by ODOT policy.

Q. How long are the funds available?

A. That depends. Earmarks are typically available until expended. This applies to earmarks in authorization acts and “Surface Transportation Program” earmarks in appropriations bills. Discretionary program funds, whether obtained through an appropriations act as an earmark or an annual solicitation, are available for a limited period of time. The length of time depends on the specific discretionary program. They may need to be obligated by the end of the Federal fiscal year (September 30) in which they are received or they may be available for a period up to four years (the year in which they are received plus three more). When ODOT informs you of the discretionary award you will be told how long it is available to you.

Q. My discretionary award is supposedly good for four years so can I wait to use it?

A. Even though a particular discretionary award may be ‘available’ for more than one year it is subjected to the *August Redistribution* process. Each year, FHWA ‘pulls back’ a state’s unobligated balances to redistribute to other states that need obligation limit. It is extremely important to try to obligate discretionary funds as soon as possible to avoid this from happening. Should discretionary funds be pulled back in a redistribution process there are two risks. One, because it can take several months for the funds to be returned, the project may be ready to sell long before the funds are available. ODOT can not obtain Federal authorization unless the funds are there. This will hold up the project. Second and worse case, funds are not guaranteed to be returned. To date, funds have been returned in the following year, however, what is returned is sometimes less than what was ‘pulled back’. So, again, project sponsors should act as quickly as possible to obligate these funds.

Q. What is meant by “obligate”?

A. To “obligate” is to obtain the Federal government’s legal commitment to pay or reimburse the states for the Federal share of a project’s eligible costs. The act of obligation is synonymous with obtaining Federal authorization. As discussed above, Federal authorization must be obtained before the start of work. For construction work, Federal authorization / obligation of funds is obtained by processing the project’s Plans, Specifications & Estimate package (PS&E).